

SAMUEL WHITSON,)
)
 Plaintiff,)
)
 v.) **No. 3:05-CV-274**
) **(Phillips)**
 KNOX COUNTY BOARD OF EDUCATION, et al.,)
)
 Defendants.)

This matter is before the court on plaintiffs' motion for bench trial. In support of the motion, plaintiffs state that in their complaint, they did not demand a jury trial. When the defendants, Knox County Board of Education, Charles Lindsey and Cathy Summa, filed their answer to the complaint, they did not demand a jury trial. Defendant Cathy Summa was sued in her individual capacity and when she filed her answer and counter-claim, she demanded a jury trial. On September 6, 2006, the court dismissed Summa's counter-claim. The parties later stipulated that defendant Summa be dismissed from this action in her individual capacity. Therefore, the only remaining defendants in this case are the Knox County Board of Education, Lindsey and Summa in their official capacities. Plaintiffs assert that the Board of Education and Knox County officials have effectively waived their right to a jury by failing to request a jury, and plaintiffs move for an order that this trial be heard before the bench.

Defendants have responded in opposition stating that defendant Summa demanded a jury on all issues before the court. Following the dismissal of defendant Summa's counterclaim and the parties' stipulation that Summa be dismissed from this action in her individual capacity, the court issued an amended scheduling order setting the case for trial before a jury. Plaintiffs did not move for a bench trial upon receipt of the amended scheduling order, and the defendants have not consented to withdraw Summa's demand for trial by jury.

Rule 38(d), Federal Rules of Civil Procedure, states that a demand for trial by jury may not be withdrawn without the consent of the parties. Rule 39(b) addresses the situation where no demand is made: "Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, *on motion*, order a jury trial on any issues for which a jury might have been demanded (emphasis added). In this case the defendants have not consented to the withdrawal of the jury demand made by defendant Summa. Moreover, the defendants have opposed plaintiffs' motion for bench trial. By their opposition, the court finds that defendants have demanded a jury trial pursuant to Rule 39(b) and that motion will be granted. Accordingly, plaintiffs' motion for bench trial [Doc. 128] is **DENIED**, whereby this case will be tried to a jury.

ENTER:

s/ Thomas W. Phillips
United States District Judge